IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924 1925

No. 51

THE BUCKEYE COAL & RY. CO. ET AL.,
Appellants,

vs.

THE HOCKING VALLEY RY. CO., CENTRAL UNION TRUST CO., THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Ohio.

BRIEF FOR APPELLANTS.

WILLIAM BURRY,
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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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THE HOCKING VALLEY RY. CO., CENTRAL UNION TRUST CO., THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Ohio.

STATEMENT OF THE CASE.

The original litigation here involved was begun by the United States against the Lake Shore & M. S. Ry. Co., The Hocking Valley Ry. Co., The Sunday Creek Coal Co. and various other railroad and coal companies, to force the dissolution of a combination of railroad companies and coal companies operating chiefly in the State of Ohio. The original cause was entitled *The United States* v. *The Lake Shore and Michigan Southern Ry. Co., The Hocking Valley Ry. Co., The Sunday Creek Coal Co., et al.*

A decree was entered in the cause finding an unlawful combination, ordering the combination of railroads to be dissolved and ordering all the railroad companies to

sell or otherwise dispose of all of their holdings in coal-producing properties located on their lines of road to persons or interests other than such railroads.

The present appeal is from an order of the court (rec. 115) denying and dismissing a petition of the Buckeye Coal Co. and the Sunday Creek Coal Co. which asked the court to force the Hocking Valley Ry. Co. to obey that decree and to sell or otherwise dispose of its interests in its coal properties, which that railroad company still holds. A similar petition (rec. 62) asking like relief was filed by the United States (original complainant) and that petition was also dismissed. The United States, however, did not appeal from the order of dismissal.

This cause was certified under the act of February 11, 1903, as an act to expedite the hearing and determination of suits in equity, etc., and was heard by the then three circuit judges. An appeal in this cause is therefore direct to this court.

History of the Case.

After issues had been made in the original litigation, a great deal of testimony was taken and an opinion was rendered holding the equities of the case to be with complainant, the United States, that an illegal combination existed as charged in the bill and that a decree should be entered directing a dissolution of the combination, and particularly directing that the railroads should dispose of, by sale or otherwise, all interests of any kind that they had in the coal mines and properties along their lines of railroad. That opinion is reported as *United States* v. *Lake Shore & Michigan Southern Ry. Co., et al.*, 203 Fed. 295. It also appears on pages 117 to 147 of the present printed transcript of record, with an opinion by one of the judges, concurring in part and dissenting in part, beginning on page 147.

A final decree was entered upon that opinion on March 14, 1914 (erroneously printed as 1924 on page 165 of the record) and appears as pages 165 to 183 of the printed transcript of record. That opinion shows the different railroads and coal companies made parties defendant; the shipping and the movement of coal over the different railroads; the competition that at one time existed among the different railroads for carrying coal; the combination of all the railroads; the stifling of competitive rates, and the acquisition by the railroads, in various ways, of a number of coal companies, of a number of coal mines and of large areas of coal lands.

The decree (rec. 165) makes a number of findings of fact closely following the opinion, recites the various ways in which the combination was effected and complete control of the entire coal district in that part of Ohio acquired, directs dissolution of the railway combination and orders that each and all of the railroad companies

> "be and they hereby are perpetually enjoined from directly, or indirectly, owning, holding or acquiring any stock in said Sunday Creek Company, or in any of the companies hereinbefore named, the property of which is owned, leased or controlled by said Sunday Creek Company, intending hereby to impose an absolute prohibition against said railway companies, or any of them, owning or controlling any shares of stock in said Sunday Creek Company, or otherwise owning or controlling, directly or indirectly, any interest in any of the coal properties in which that company is interested" (rec. 178).

At that time The Sunday Creek Company held a long time lease of all the property of The Buckeye Coal and R. Co. (rec. 7, 12, 27).

The decree gave the railway companies two months in which to carry out the separation and authorized the sale of the stock of the Sunday Creek Coal Co. free and

clear from any liens thereon in favor of the railroad companies or of the Central Trust Co. of New York, as trustee under the Hocking Valley Ry. Co. consolidated mortgage. It further provided that the name of any proposed purchaser of any of the coal company stock or property should be submitted to the court for examination to ascertain if the sale was *bona fide;* provided that if such sales were not made a receiver should be appointed to sell the coal properties; made the same provisions (rec. 180 *et seq.*) concerning other coal properties; and provided that such properties should be sold free from encumbrances, etc.

The decree also provided (rec. 183),

> "That jurisdiction of this cause be retained by this court for the purpose of making such other and further orders and decrees as may be necessary to the due execution of this decree and the complete dissolution of the combination and monopoly herein condemned."

In 1915, the Hocking Valley Ry. Co. presented a petition asking leave of the court to sell certain stocks and bonds of the Buckeye Coal Co. and of the Ohio Coal Company to Mr. Poston. In an opinion appearing on pages 183 to 189 of the printed transcript and filed July 30, 1915, (erroneously printed as 1914) the court refused to approve the sale, principally on the ground that part of the consideration moving to the railway company was income bonds upon the property, to be held by the railway company or its trustee, the Central Trust Company, as pledgee (rec. 185-8), and the court held that thereby the railway company would retain an interest in the coal properties, which was forbidden by the main decree of March 14, 1914, thus deciding that no revenue from the coal lands could go to the mortgage trustee to be applied on the bonds of the railway company.

In the opinion the court said (rec. 184):

> "We cannot too often repeat that the prime purpose of our decree was to insure the complete separation of the railroad interests from the coal-mining interests, so that the former should not and could not dominate the latter. The possibility that such control may be accomplished through ownership of mortgage bonds and the agency of the trustee or through a foreclosure and purchase, is more remote and contingent than the prospect that it would follow from stock ownership; but substantial domination in the former manner may be no less effective."

Complying with a suggestion made in the opinion just referred to, on October 9, 1915, the United States, original complainant, filed a petition (rec. 189) setting up that the Hocking Valley had not obeyed the original decree in that it still held title to a large number of shares of the capital stock of the Buckeye Coal & Railway Co. and of capital stock and bonds of the Ohio Land & Railway Co. (both coal companies) and in certain other coal properties, and that such stock was pledged with the Central Trust Co. as trustee of the Hocking Valley First Consolidated Mortgage securing $20,000,000 of 100 year 4½ percent bonds, as additional collateral security therefor, and praying that the Hocking Valley Ry. Co. be required to sell and dispose of all such stock and bonds free and clear of any lien of its said mortgage.

To that petition the Hocking Valley Ry. Co. filed an answer (rec. 192) denying certain of the allegations of the petition and setting up that the capital stocks referred to were pledged with the trustee of its first mortgage bonds. The trustee under that mortgage, the Central Trust Company, also filed an answer (rec. 194) setting up principally that the capital stocks of the coal companies, which the government asked to have sold, had been pledged with the trust company to secure the bonds issued under the Hocking Valley Ry. Co. first mort-

gage, and that the lien of that mortgage could not be interfered with.

The trustee also insisted that the reservation of jurisdiction in the original decree was not sufficient to enable the court to enter an order for the sale of the capital stocks referred to, and insisted that the court was without jurisdiction to entertain the petition.

On May 19, 1916, the court entered an order (rec. 201), containing its reasons for the order and holding that it had retained jurisdiction of the subject matter and the parties for the purpose of carrying out the decree of March 14, 1914, to the fullest extent, and it had authority to order the sale of the stock free from the lien of the mortgage upon giving the trustee, for the use of the bondholders, a fair consideration for the property so ordered to be sold. In two notes of opinion attached to the order so entered and appearing at the foot of pages 205-208, the court gave its reasons, to some extent, for entering the order, saying:

> "We regard as clear the power of the court to compel the bonds and stocks to be sold free from the lien of the consolidated mortgage, substituting therefor in the hands of the mortgage trustee the proceeds of such sale. One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the anti-trust law or the commodities clause, and such that the mortgage serves practically to aid in tying them together, must be deemed to hold his mortgage subject to the contingency that if the complete and final separation of one item of the mortgaged property from the remainder becomes essential to the due enforcement of either named law, the court charged with such enforcement may take control of that item, free it from the consolidating tendency of the mortgage, and substitute therefor its judicially ascertained equivalent. * * *
>
> "If the power exists to direct a sale free from lien, the conditions here found make appropriate the

exercise of that power. The consolidated mortgage was given by a railroad and a coal company; it challenged attention to those features which carried potential violation of laws already passed or which might be passed; and the values of these pledged stocks and bonds, having nothing except lands to give them value, can be determined with such substantial accuracy that there is little danger of a mistake seriously prejudicial to the mortgagee. We would have no confidence that a sale of the mere equity of the Hocking in these stocks and bonds would bring more than temporary independence. The purchaser could not free them from the overwhelming mortgage nor compel its foreclosure, but the danger of foreclosure and the consequent wiping out of this equity would be constant. The influence, if not the practical domination, of the railroad mortgagor, upon whom the purchaser must rely to prevent foreclosure, could not be escaped." (rec. 208.)

From that order the Central Trust Company, trustee, took an appeal to this court, but afterward abandoned the same (rec. 212).

In pursuance of the order so entered by the district court, the capital stock of the Buckeye Coal Co. and the capital stock and bonds of the Ohio Land Co. were sold to John S. Jones and the sale was approved by the court November 10th, 1916. The price paid by Jones was $400,000 for the stock and bonds of the Ohio Land Co. and $50,000 for the stock of The Buckeye Coal Co., or $450,000 in all, and the purchase money was paid to the mortgage trustee to be applied on the bonds. The amount paid for the capital stock of the Buckeye Coal Co. was due in part to the fact that the Buckeye Co. had mortgaged its lands as additional security for the $20,000,000 mortgage of the Hocking Valley Ry. Co., but principally because all its lands were then under a long time mining lease to the Sunday Creek Coal Company (rec. 7, 12, 27). Probably that lease did not provide for any minimum production, thereby leaving it in the

power of the Sunday Creek Coal Co. to leave the coal unmined for years, thus escaping payment of royalties, and the Sunday Creek Coal Co. could, during such delay, mine coal from lands which it owned or from lands which it had leased with an agreement that it would mine a certain amount of coal from them in each year.

It is hardly necessary for us to here state the formation of the combination of railroad and coal properties which was denounced in the decree of March 14, 1914. We cannot state it as well or as succinctly as it was stated by the court in its opinion on pages 117 *et seq.* of the printed record and set out in the findings of the decree on pages 165-173 of the record.

For the sake of continuity of argument we would state that in 1898 there was pending in the federal court in Ohio foreclosure proceedings which affected several railroads controlling most of the coal-carrying trade of a large part of Ohio, together with several coal companies, coal operations and coal fields in the territory served by those railroads. Late in that year a foreclosure decree was entered directing the sale of all the railroads and coal properties involved in the litigation. At the foreclosure sale held early in 1899, a committee of bondholders, represented by Ingalls & Gardiner, bought in all the railroad and coal properties. A plan of organization dated January 4, 1899 (rec. 55) had been promulgated by J. P. Morgan & Co. (opinion, rec. 126; decree, rec. 172) for a combination of the several railroads, coal companies and coal properties involved in the decree of foreclosure.

At that time The Buckeye Coal & Ry. Co. was organized to take over and hold principally, if not wholly, the coal properties formerly held by the Hocking Coal & R. Co. and embraced in the decree. There were involved

in the combination six or seven railroad properties and a number of coal companies and coal lands mentioned in the decree and opinion of the court above referred to.

The Hocking Valley Ry. Co., a new company formed under the scheme of reorganization referred to, at that time issued $20,000,000 of its first mortgage 4½% bonds and to secure the same gave a first mortgage upon its railroad properties and also required The Buckeye Coal & Ry. Co., all of whose capital stock had been, under the scheme of reorganization, given to the Hocking Valley Ry. Co., to sign the mortgage and pledge its property as additional security to the bonds so issued. The Buckeye Co. was not, however, required to sign the bonds. It only pledged its property as surety. The capital stock of the Buckeye Co. owned by the Hocking Valley Ry. Co. was, however, by the latter company pledged to the mortgage trustee, the Central Trust Co., as collateral security, as was also the stock of a number of other coal companies, including the stock of the Sunday Creek Co.

It was against this combination of railroads and coal properties that the United States filed its bill in this case, and concerning which the opinions were delivered and the decrees entered to which we have heretofore referred.

That main decree was entered March 14, 1914. Late in that year in obedience to that decree the stock of the Sunday Creek Coal Co. was sold to John S. Jones, coal operator, free from the lien of the mortgage. The court examined Jones, and finding that he was not in any way acting for railroad interests. It approved the sale to him (rec. 212).

Then followed the application for leave to sell to Poston, the denial thereof, the application of the United States to force the sale of the Buckeye Co. stock and the granting thereof.

The mortgage securing the $20,000,000 bonds of Hocking Valley Ry. Co. contained a provision for a royalty of two cents to be paid on the bonds, and section 9 of article 2 of the mortgage is as follows (rec. 15, 216):

> "Sec. 9. On July 1st, 1900, and on or before July 1st, in each and every year thereafter, the Coal Company shall deliver to the Trustee a statement in writing showing the amount of coal mined from lands owned by the Coal Company, and mortgaged hereunder, during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the Trustee hereunder a sum equal to two cents per ton on all coal so mined during such preceding year.
>
> "All sums so received by the Trustee shall by it be used and applied in purchasing bonds hereby secured, in such manner as to it shall seem best, and at such prices as it shall deem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be canceled. All sums so received by the Trustee and not by it so used within six months from its receipt thereof, shall be returned to the Coal Company."

At the time the court, in October, 1916, forced the sale of the capital stock of the Buckeye Coal Co. and the stock and bonds of the Ohio Land Co. to Jones, a contract was made between the seller and the purchaser (rec. 57), and that contract was approved and the sale ordered by the court. There was evidently a dispute between the seller and the purchaser as to whether the property of the Buckeye Co. would remain subject to the $20,000,000 mortgage and be obliged to pay the 2c royalty referred to in sec. 9, art. 2, above referred to. It is recited in that contract in Clause (c) that such a mortgage had been made and there were evidently various claims made by the purchaser and seller against each other, for paragraphs "Fourth" and "Fifth" (rec. 60-61) provide for mutual releases of all claims;

> "except that nothing in this Article Fifth, or else-

where in this Agreement contained is intended or shall be construed in any wise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in said First Consolidated Mortgage of the Hocking Company, and the Hocking Company and the Chesapeake Company respectively do not hereby waive or release the Buckeye Company, its successors or assigns from any such covenants and obligations."

This quotation shows that the contract was not "to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in" the railway mortgage. That question was, therefore, left open. So far as that contract went, nothing was agreed on concerning that question. If the act of the Buckeye Company in making itself surety upon the mortgage and pledging its lands was unlawful and void because it was part of the combination of railroad and coal properties so vigorously denounced by the court in its opinions and decrees, that *status* remained unchanged. If for that reason any liability on a foreclosure or any liability on the 2c royalty imposed by Section 9 of Article 2 of the mortgage was unlawful and against public policy and the Sherman act, such void covenants were not ratified in any way by the Buckeye Company, for nothing in the contract should in any wise "affect" the several obligations or covenants of the Buckeye Company contained in the mortgage.

While the Hocking Valley Co. owned all the Buckeye Company stock, while the railroad and the coal company were under the same control, the Buckeye Company, of course, paid to the railroad company the 2c royalty referred to. From the time they were separated by order of the court in November, 1916, no statement was made and no royalty was paid, and it may be taken that the Buckeye Company, under the management of Jones, be-

lieved that the making of the mortgage and with it the provision concerning royalty were part of the illegal combination denounced by the court, and that, therefore, no royalty was due; and the Hocking Valley Co. and its trustee probably thought that it would some day seek to enforce the collection of the 2c royalty.

The position of the Buckeye Company as surety only was, however, acknowledged in the contract, for the last sentence of the Fifth provision is as follows (rec. 61):

> "If the Hocking Company at any time defaults in the payments or other obligations imposed on it by said consolidated mortgage, and said mortgage is enforced or foreclosed in any way or to any extent, the Hocking Company agrees that it will cause all the property of the Hocking Company to be first exhausted before any recourse is had under said mortgage to the property of the Buckeye Company and agrees to indemnify and to save and hold harmless said Buckeye Company from any loss or damage to or payment by said Buckeye Company under the provisions of said mortgage, save only said two cents per ton royalty above-mentioned."

The next step taken was by the mortgage trustee bringing suit in January, 1919, in the Federal Court in Ohio against the Buckeye Coal Co. to collect from it the 2c a ton royalty on coal mined after March 1, 1916, which suit is still undisposed of as appears by the answer of the Hocking Valley in this case (rec. 23-4).

Thereupon, as appears from the same answer (rec. 25-6, also 246) the Buckeye Coal Co. on April 21, 1919, commenced a civil action against the Central Trust Company, trustee, and the Hocking Valley Ry. Co. in the Court of Common Pleas of Perry County, Ohio, where the land was situated, to quiet its title to said lands, and afterward the Sunday Creek Coal Company was made a party plaintiff.

The Sherman Anti-Trust act was not involved in that

suit to quiet title; no person represented the public; neither the United States nor the State of Ohio was present. It was simply a private suit between the persons named, relying on the decree of March 14, 1914, and being such suit, the court of common pleas, in January, 1920, decided the case on the merits in favor of defendants, thereby for the purposes of that suit sustaining the validity of the mortgage. That court disregarded all public policy, disregarded the opinions and decrees of the federal court in this case, and treated the suit simply as a private dispute between the parties named.

The plaintiffs then carried that case to the state court of appeals for Perry County, and upon a hearing there a like judgment was entered in that court. Thereafter, on May 5, 1921, plaintiffs in that cause filed their motion in the Supreme Court of Ohio for *certiorari* to bring up the record for review, and that court on June 7, 1921, overruled that motion (rec. 247).

Thereupon, on December 6, 1921, the Buckeye Coal Co. and the Sunday Creek Coal Co. filed the petition herein which is now before the court on this appeal (rec. 7-11). That petition sets up the main decree herein of March 14, 1914, which held the combination of railroad and coal properties illegal, referred to portions of the opinions pronounced and decrees entered herein, referred to section 9, article 2 of the mortgage providing for the 2c royalty, and prayed that the lands of the Buckeye Coal Company be released and eliminated from said mortgage and particularly from the 2c royalty provision thereof, *or that all the interests of the railway company and its trustee be sold* or that other appropriate relief be given. To this petition, about four pages long, we respectfully call the attention of the court. It is our main document.

While this petition was pending, the United States, original complainant, presented a petition substantially

the same in all its averments of facts as the one presented by the Buckeye Co. (rec. 62 *et seq.*)

The prayers of these petitions by the Buckeye Co. and by the United States differ somewhat, but the main object of the petitions and of the prayers is the same—to complete the separation of these railroad properties and coal properties called for by the decree of March 14, 1914, by releasing the coal lands from the lien of the railway mortgage and by taking from the railway and its mortgage trustee a right to 2c royalty on all coal mined from the lands of the Buckeye Co., by sale of those interests or otherwise.

The Hocking Valley Ry. Co. and its mortgage trustee filed answers, substantially the same, to these two petitions. They set up and rely upon what was done under the reorganization scheme, dated January 4, 1899, submitted by Morgan & Co. and fully carried out—the same scheme that met the unqualified condemnation of the court below in this cause and which was set aside as illegal by the decree of March 14, 1914 (rec. 12, 27).

The answers and the uncontradicted evidence in support thereof set out that the purchasers at the foreclosure sale held in January, 1899, acquired the different railroad properties and coal companies and coal properties described in the decree; that the Hocking Valley Ry. Co. was then organized to take over some or all of the railroad properties; that the Buckeye Coal Co. was then organized to take over and hold part of the coal properties so acquired by the purchasers; that it was provided that the Hocking Valley Ry. Co. should mortgage its property to secure an issue of $20,000,000 of bonds; that the mortgage should include the coal lands of the Buckeye Co., and that the Buckeye Co. should sign the mortgage but not the bonds. The answers set up also that the coal lands were placed in the name of the Buck-

eye Coal Co. upon no consideration passing to the purchasers other than the agreement of the Buckeye Co. that it would sign the mortgage covering such lands when the mortgage was made. No other than a like consideration is shown to have been paid by the Hocking Valley Ry. Co.

The proposition of the purchaser (rec. 53) to convey these lands to the Buckeye Coal & Ry. Co. on condition it should join in the mortgage, is dated February 25, 1899. The resolution of the company of February 25, 1899, accepting the proposition appears on page 55 of the record. The contract between the Buckeye Coal Co. and the purchasers (rec. 45) is dated February 25, 1899. The deed from the purchasers to the Buckeye Co., dated February 25, 1899, appears on page 48 of the record. Each of these documents provides the Buckeye Co. will mortgage the property so acquired by it under the Hocking Valley Ry. Co. general mortgage and various other provisions are made, but in none of the documents referred to is there any mention made of reserving a 2c royalty as a sinking fund for the mortgage.

The resolution of the Buckeye Co. (rec. 55) provides that the proposition be accepted under the provisions and conditions therein stated, but no mention is made of the 2c royalty. That provision was evidently an afterthought. The $20,000,000 mortgage is abstracted beginning on page 215 of the record and recites (rec. 217) that at a meeting of the board of directors held February 25, 1899, the president and secretary of the company were authorized and directed to execute the first consolidated mortgage "substantially of the tenor of the draft thereof now submitted in this meeting upon all the real estate, lands and tenements of this company heretofore acquired by this company" from the purchasers. Nothing is said

in that resolution about the 2c royalty. When, however, the mortgage came to be finally executed it contained section 9 of article 2 providing for the 2c royalty.

All the capital stock of the Buckeye Co. was issued to the Hocking Valley Ry. Co. and under its direction the Buckeye Co. did sign the mortgage referred to.

In hearings had before the lower court on the above petitions, all the documents we have referred to were introduced in evidence. A certificate or statement of evidence introduced was prepared and filed, and it appears beginning on page 214 of the record.

On January 18, 1924, the court filed an opinion (rec. 109) on these two petitions and on the same day entered an order dismissing the petition of the Buckeye Company and also the petition of the United States, but without prejudice to the right of the United States to make further application if it thought the situation sufficient to justify such further application.

The Buckeye Company prosecutes this appeal from that order.

Errors Relied On.

1. The District Court erred in dismissing the petition of the Buckeye Coal & Railway Company and The Sunday Creek Coal Company filed in said cause on or about December 6, 1921.

2. The District Court erred in denying the relief or any part of it prayed for in said petition.

3. The District Court erred in denying that part of the prayer of said petition, asking "That all the lands of said Buckeye Company, be released and eliminated from said mortgage, and particularly from said Section 9 thereof."

4. The District Court erred in denying that part of the prayer of said petition asking "That all interest or interests of said railway company and said trust company in said property be sold and for such other and appropriate order herein as will effectively carry out the purpose and effect of the main decree entered herein" on March 14, 1914.

BRIEF OF ARGUMENT.

The Main Opinion Given and Decree Entered in This Case Hold the Entire Combination of the Railroad and Coal Properties Under the Reorganization Scheme of January 4, 1899, to Be Illegal and Fraudulent.

United States v. *Lake Shore & So. Ry. Co. et al.*, 205 Fed. Rep. 295.

Same opinion printed in present record at page 117.

That opinion was pronounced in December, 1912, and decree entered March 14, 1914. The courts of Ohio had previously, in 1909, held the combination illegal and void.

State ex rel v. *Railway*, 12 Ohio Cir. Ct. R. (N. S.) 49, 145, cited in 203 Fed. 300.

To the same effect is,

Continental Co. v. *United States*, 259 U. S. 156.

The case at bar differs from *Continental Co.* v. *United States, supra*, in that the Buckeye Coal Co. was not liable upon the bonds issued. It did not sign the bonds and was not liable for them, and only signed the mortgage as surety. In the Continental Co. case it appears that part of the issue of the bonds had been used for the benefit of the coal company and the coal company had signed the bonds.

Therefore, in the present case the Buckeye Co. should not be required to contribute anything on the separation. However, our petition asks that, if equity requires it, any interest the mortgage trustee has in the Buckeye Co. lands should be ascertained and sold.

The Provision of the Mortgage Reserving a 2c Royalty to Be Applied on the Hocking Valley Railway Company Bonds Is Unauthorized and Illegal.

There is no resolution by the stockholders or directors of the Buckeye Coal Company showing any authority for giving a 2c royalty.

Neither the proposal of the purchasing committee to transfer the coal lands to the Buckeye Company, nor the resolutions of the directors and stockholders of the Buckeye Company accepting that proposal, nor the contract between the purchasing committee and the Buckeye Company made pursuant to that proposal, nor the deed from the purchasing committee to the Buckeye Coal Company transferring the property, makes any reference to such 2c royalty. The recital in the mortgage is that the Buckeye Company authorized the mortgage *substantially* in the form then being executed (rec. 53, 57, 45, 48).

The insertion of a 2c royalty to apply on bonds which the Buckeye Company had not signed and on which there was only a surety is incongruous.

The provision for a 2c royalty is clearly illegal and objectionable as being an interest in the coal land retained by the railway company in violation of the main opinion and decree in that case and of the principles laid down in *Continental Company* v. *United States,* 259 U. S. 156.

The Opinion of the Court Denying the Present Petitions for the Sale by the Hocking Railway Company of Its Remaining Interests in the Buckeye Company Coal Lands Is Not Well Considered and Is Erroneous.

That opinion misstates the prayer of the Buckeye Coal Company petition in stating that it asks that the mortgage be released without compensation. The prayer is that the mortgage ought to be released without compensation, or in the alternative, that if the court thinks meet, the value of the remaining interests in the coal lands be ascertained and sold.

The lower court expresses a doubt (rec. 113) as to a continuing jurisdiction of the lower court to compel complete dissolution of the condemned combination of railroad and coal properties. In this the opinion is clearly erroneous.

The court refused to allow a sale of the Hocking Valley Company's interests in the Buckeye Coal Company land to Mr. Poston, because part of the consideration to be paid by him was income bonds secured upon the coal property, holding that thereby the Railway Company retained a substantial interest in the Coal Company's property. The same court now, by dismissing the petitions, refused to require the sale of the very substantial interests retained by the Railroad Company in the coal lands through reservation of a royalty and by a mortgage which subjects the coal lands to that mortgage (rec. 183, 109). This is also in conflict with *Continental Co.* v. *United States,* 259 U. S. 156, 167.

The lower court erred in its opinion in holding that the mortgage lien and the royalty provisions of the Hocking Valley Railway mortgage were inconsequential burdens on the Buckeye Coal Company.

It was shown on the hearing that over 18,000,000 tons of lump coal were still to be taken from the Buckeye Company lands and 2c royalty on this amount of coal would be a heavy burden (rec. 248).

The burden of the mortgage on the Buckeye Coal Company is also heavy, because it acts as a cloud upon its title to all its lands and also destroys any allowance therefore as invested capital under the rulings of the income bureau of the Treasury Department.

The Controlling Effect of the Decrees of the Federal Court Over the Decree of the State Court.

The action of the state court, when the Buckeye Coal Company filed its suit to clear a cloud upon the title to its lands, was contrary to the prior decree entered in this cause on March 14, 1914, and in conflict with the several other decrees entered by the lower court.

The Lower Court Also Erred in Intimating in Its Opinion That It Would Be Inequitable to Relieve the Buckeye Coal Company from the Lien of the Mortgage Because It Agreed to Sign the Mortgage as Surety When It Acquired the Lands.

The Hocking Valley Railway Company acquired its railroad from the purchasers' committee who purchased the property in 1899. The railroad company paid nothing therefor but the issuance of its stock and the making of the railway mortgage, on which however, it concedes the Buckeye Coal Company is only a surety. The Buckeye Company acquired its property from the purchasers'

committee on substantially the same terms, namely, the issuing of all its stock therefor and signing as surety the Railway Company mortgage. The Railway Company has agreed to indemnify the Buckeye Coal Company for signing that mortgage. There is, therefore, no equity in the Railway Company's now attempting to hold the mortgage on the property of the Buckeye Coal Company or in attempting to force that Company to now contribute a royalty towards the payment of the Railroad bonds which it did not sign and for the payment of which it only pledged its property as a surety.

Under such circumstances it would be inequitable for the Hocking Valley Railway Company to insist that the lien of the mortgage be continued or that any royalty be paid.

The position of the Buckeye Coal Company is in accordance with the settled law of this case and is not inequitable.

East St. Louis v. *Jarvis*, 92 Fed. 735.
McMullin v. *Hoffman*, 174 U. S. 639.
13 C. J. 489.

The position of the trustee under the railroad mortgage is no better than that of the Railway Company, for the mortgage was one signed by a railroad company and a coal company and therefore bore upon its face notice of a potential illegality which has now become certain by the opinion of the lower court in this case and the orders and decrees entered in this case (rec. 208). And that position is upheld in *Continental Co.* v. *United States*, 259 U. S. 156, 172.

The Opinion by Judge Lurton, 85 Fed. 815, Relates Only to *ultra vires* and Is Not in Any Way Concerned with Public Policy or the Sherman Anti-Trust Act.

ARGUMENT.

The Scope of the Main Opinion and Decree.

We cannot state more strongly than has the lower court in its opinions above referred to, the object and scope of the original bill in this cause and of the decree rendered thereon on March 14, 1914. That decree found that the entire combination of these railroad and coal properties under the Morgan scheme of reorganization, dated January 4, 1899, was illegal and fraudulent, especially under the Sherman Anti-Trust law.

In the lower court's opinion (203 Fed. 295; rec. 117) the court gave the history of the competitive conditions prevailing in the Ohio coal field prior to January 4, 1899; the stifling of competition, and the combination of the different railroads and the different coal properties in one management brought about by the reorganization in 1899, and held them illegal under the Sherman anti-trust act. Under the history of these railroad and coal operations as given in the opinion and decree referred to, the combination and the stifling of competition was also undoubtedly illegal at common law.

From the main opinion in this case it appears that the courts of Ohio also held illegal the 1899 scheme of reorganization and the consequent combination of railroad and coal properties. In that opinion the court said (rec. 121):

> "The combination and conspiracy averred originated in 1899 and have as alleged been continued in one form or another ever since. What happened between that time and the year 1909 resulted in a suit in *quo warranto* by the State of Ohio against the Hocking Valley. *State, ex rel.*, v. *Railway*, 12 O. C.

> C. (N. S.) 49, 145. The first decision in that case was rendered April 24, 1909, and upon rehearing adhered to July 21 of that year; and on January 18, 1910, the court made a finding of facts, with separate conclusions of law thereon (set out in the present record), in terms ousting the Hocking Valley from the power of owning and holding shares of stock in the Kanawha & Michigan, the Buckeye Coal & Railway Co., the Sunday Creek Coal Co., the Sunday Creek Co., and the Continental Coal Co.;'' etc.

The vice of the combinations referred to and which the court sought to suppress is that a railroad company will in some way or other favor its own coal mines or any other coal production in which it has even a remote interest. The ruling of the court (rec. 183) on the attempted sale to Poston was that as long as the Hocking Valley Ry. Co. or rather its mortgage trustee had an interest in the coal lands by way of an income bond thereon, the decree of March 14, 1914 was not complied with, for the railroad company would be inclined to favor the Poston coal properties, to which it must look for payment of interest and finally of principal of those income bonds. How complete that separation must be is also shown by the quotations we have made from what the lower court said when dealing with the sale of the Buckeye Coal Co. stock in 1915 and 1916 (rec. 201).

Nothing can possibly comply with that opinion and decree other than a complete separation of all coal interests from all railroad interests in the territory and between the parties dealt with by the court.

That principle of complete separation has become the fixed law of this case. Even if the lower court desired to change the decree of March 14, 1914, it is too late for it to do so. That decree is the law of this case. Moreover, the construction placed on that decree by the court in 1915-6 in dealing with the sale of the capital stock of

the Buckeye Coal Company has also become the law of this case, and the lower court is bound by it.

THE COMBINATION OF THE RAILROAD AND COAL PROPERTIES UNDER THE MORGAN SCHEME OF REORGANIZATION, DATED JANUARY 4TH, 1899 WAS ILLEGAL.

United States v. *Lake Shore & M. S. Ry. et al.*
203 Fed. 295; Record 117, 165.

The opinion and decrees of the lower court, even if they could now be reviewed, correctly state and apply the law. It would be possible to present many cases in support of the main decree entered herein on March 14th, 1914, and of the proceeding and decree which in 1915-6 forced the sale of the capital stock of the Buckeye Coal Co. and the Ohio Land Co. free from the lien of the mortgage of the Hocking Valley Ry. Co. securing the $20,000,000 of bonds, but we will only cite one. We refer to the recent case of *Continental Co.* v. *United States*, 259 U. S. 156. One phase of the latter case, the one discussed in the opinion on pages 170-6, is very analogous to this case and to the relief asked by us in our petition filed December 6th, 1921, and which the lower court dismissed by the order from which this appeal is taken.

The *Continental Co.* case, indeed, quotes with approval from the order and opinion of the lower court in the case at bar, pronounced in 1916, which directed sale of the capital stock of the Buckeye Coal Co. and the Ohio Land Co. free from the lien of the trust deed to the Central Trust Co. The procedure approved in the *Continental Co.* case is applicable and ought to be decisive in favor of granting the present petition which asks that the remaining interest of the railroad company in the coal properties be disposed of.

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All the elements in the *Continental Co.* case that required dissolution of the combination there existing, obtain in the present case. The right and power of the court to take the coal properties from under the lien of the railroad mortgage upon proper terms exists in both cases. The terms of separation may differ but the illegality of such combination exists and the proper remedies are shown in the *Continental Co.* case. On page 172 it is said:

> "Nevertheless, spread all over the face of the general mortgage, was the information and notice of the union of the railway and coal properties for the very purpose which is the head and front of the offending under the Anti-Trust Law and which requires this court to dissolve the illegal combination. The general mortgage was the indispensable instrument of the unlawful conspiracy to restrain interstate commerce."

In considering this matter there is, however, to be observed an important and fundamental difference in the facts of the two cases and in the terms upon which the coal properties should be released from the railroad mortgage.

In the *Continental Co.* case the coal company had signed the bonds secured by the mortgage trust deed and was liable upon those bonds. It would appear that part of the proceeds of those bonds had been expended in improving the coal property. In the case at bar none of the moneys from the $20,000,000 bonds are shown to have been expended on the coal property.

The Buckeye Coal Co. did not sign the bonds or assume the payment thereof. In the deed of the purchasing committee at the foreclosure sale, February 25th, 1899, and also in the agreement between the purchasing committee and the Buckeye Coal Co. of the same date it is stated (rec. 50):

"it being distinctly understood and agreed that the

> Company assumes no obligation in respect to any bonds or the payment thereof, other than to pledge and mortgage, as security therefor, all property received by the Company from the Purchasers or their assigns, or according to the terms of any instrument making or conveying such property."

As the coal company did not sign the bonds and is not shown to have received any of the proceeds thereof, its act in adding its property to the mortgage and signing that mortgage was that of a surety only, and this fact is placed beyond dispute by the contract between the railway companies and Jones of October 7, 1916, when Jones acquired the stock of the Buckeye Co. The agreement in that contract is as follows (rec. 61):

> "If the Hocking Company at any time defaults in the payments or other obligations imposed on it by said consolidated mortgage, and said mortgage is enforced or foreclosed in any way or to any extent, the Hocking Company agrees that it will cause all the property of the Hocking Company to be first exhausted before any recourse is had under said mortgage to the property of the Buckeye Company and agrees to indemnify and to save and hold harmless said Buckeye Company from any loss or damage to or payment by said Buckeye Company under the provisions of said mortgage, save only said two cents per ton royalty above mentioned."

In the *Continental Co.* case it was found that a proper proportion of the mortgage debt to be borne by the Reading Coal Company was about one-third of that indebtedness, and provision was made by the court that that amount of the mortgage indebtedness should be taken care of by the coal company. In the present case that element is entirely lacking as shown by the two quotations last above made.

We insist that this difference between the two cases requires that the lands of the Buckeye Coal Co. should now be declared free from all lien of the Hocking Valley Ry. Co. mortgage, so far as that railroad is concerned.

As it appears that the Hocking Valley Ry. Co. mortgage was originally made for $20,000,000 and that the Hocking Valley Ry. Co. has now made a $50,000,000 refunding mortgage on its property (rec. 220), which provides that bonds shall be reserved to take up underlying mortgages, which includes what remains due on the $20,000,000 mortgage, and as the outstanding bonds under the $20,000,000 mortgage are recited to be $16,022,000, and that whenever the railroad company presents to the trustee such underlying bonds to be cancelled, there shall be delivered to it like bonds secured by the said $50,000,000 mortgage (rec. 221), and that said $50,000,000 mortgage has been recorded and gone into effect, for (rec. 222) $11,800,000 of those bonds have been issued as collateral to loans to the Hocking Valley Ry. Co., and that in the opinion of the lower court, filed January 18th, 1924, it is said (rec. 114):

> "no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative inference, more or less strong, in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us."

the coal company property may fairly be now released from this mortgage, or at least a reference be made to a master to ascertain whether the present property of the Hocking Valley Ry. Co. is not amply sufficient to pay the remaining bonds secured by the $20,000,000 mortgage.

We submit, therefore, that under the close analogy to the *Continental Co.* case the lands of the Buckeye Coal company should now be freed from the lien of this mortgage.

THE PROVISION RESERVING THE TWO CENTS ROYALTY TO APPLY ON THE HOCKING VALLEY RY. CO. BONDS IS UNAUTHORIZED AND ILLEGAL.

The transfer by the Bondholders Purchasing Committee on February 25, 1899, of the coal lands to the newly formed Buckeye Coal Company is shown by five documents:

(a) The proposal by the committee to transfer the coal lands to the newly formed Buckeye Coal Company (rec. 53-5).

(b) The resolution of the Board of Directors of the Buckeye Coal Company, accepting that proposition and authorizing the making of a contract (rec. 55).

(c) The contract between the purchasing committee and the Buckeye Coal Company for the transfer of the property (rec. 45).

(d) The deed from the purchasing committee to the Buckeye Coal Company, transferring the property to the latter (rec. 48).

(e) Resolution of the directors of the Buckeye Coal Company approving and accepting deed (d) and directing that all the provisions of the proposal (a) of the contract (c) and of the deed (d) be carried out (rec. 57).

In none of these documents is reference made to any provision for a two cents royalty. On the contrary the contract and the deed contain language contradicting the idea of any such royalty. In the contract it is stated (rec. 47):

> "it being distinctly understood and agreed that the Company assumes no obligation in respect of any such bonds or the payment thereof, other than to pledge and mortgage, as security therefor, all property received by the Company from the Purchasers, or their assigns, or according to the terms of any instrument making or conveying such property."

The same language is repeated in the deed (rec. 50).

It does not appear in the record that there was any resolution of the Buckeye Coal Company authorizing the insertion in the mortgage of such a royalty provision, unless it may be the recitation in the mortgage of the adoption of a resolution on February 25th, 1899, authorizing the execution of a mortgage trust deed "substantially of the tenor of the draft thereof now submitted at this meeting upon all the real estate, lands and tenements of this company" etc. The draft of mortgage referred to does not appear in the record. The mortgage is dated March 1, 1899, and during that interval probably the provision concerning the two cents royalty was inserted in the final preparation of the document. The mortgage further recites (rec. 32), "This indenture is *substantially* of the tenor of the draft thereof submitted to and approved by the stockholders of the Railway Company and also by the stockholders of the Coal Company" etc.

No authority, therefore, is shown for the insertion of this two cents royalty provision in the mortgage.

Moreover, the idea of such a two cents royalty to be paid by the Buckeye Co. upon bonds which it had not signed and for which it was not liable, is incongruous. Why should the Buckeye Co. provide such a fund for bonds for which it was not liable and which it had not signed? Does not the quotation above made from the contract between the Hocking Valley Railway Company and Jones, in October, 1916, also contradict the idea of this sinking fund, when it provides that the Hocking Valley Railway Company is to indemnify and save harmless the Buckeye Coal Company from any payment upon those bonds? The royalty constitutes a payment on the bonds. Does not that contract, in fact, act as a release from the provision for any such royalty

if there ever was a valid provision made therefor? It was simply to be paid to the trustee as money with which it might purchase bonds on the market at not to exceed 105%, and cancel them, with the provision that if such money was not so used by the trustee within six months of its receipt it should be returned to the Buckeye Coal Company (rec. 30).

All these things clearly indicate that there never was such a two cent royalty authorized by the Buckeye Coal Company or contemplated in the original papers, and that the provision for that royalty was simply something introduced into the mortgage by the final draftsman, perhaps at the suggestion of some over-zealous officer of the Hocking Valley Ry. Co.

This reservation of the two cents royalty was clearly illegal and most objectionable under the principle of separation of railroad and coal properties as announced in the opinions of the lower courts in this case and in the opinion of this court in *Continental Co.* v. *United States*, 259 U. S. 156.

Two cents a ton royalty on the ordinary forty or fifty ton coal car would mean a dollar a carload paid upon the bonds of the Hocking Valley Ry. Co. It would be a standing inducement to the railroad company for placing cars and hauling cars at and from the Buckeye Coal Company mines. It would, therefore, violate the principle calling for the separation of railroad interests from coal interests.

THE OPINION OF JANUARY 18, 1924, AND THE ORDER OF THAT DATE DISMISSING THE TWO PETITIONS ASKING FOR THE SALE OF THE INTERESTS OF THE HOCKING RAILWAY CO. AND ITS MORTGAGE TRUSTEE IN THE BUCKEYE CO. LANDS, ARE NOT WELL-FOUNDED AND ARE ERRONEOUS.

The main decree in this case was entered March 14, 1914. The Government's petition to force the Railroad company to sell the Buckeye Coal Company stock was filed in October, 1915. The court entered an order requiring the sale of that capital stock in May, 1916. The stocks of the Buckeye Coal Company and the Ohio Land Company were sold under that order in October, 1916. No action was taken by the Hocking Valley Ry. Co. or its mortgage trustee to collect any two cents royalty until January, 1919, when the trustee filed suit in the Federal District court seeking to collect such royalty. Evidently the Buckeye Coal Company and its successor, the Sunday Creek Coal Company, relied on the position that the two cents royalty clause was illegal for the reasons hereinbefore stated, and did not pay any such royalty, and have not yet paid any.

Upon the trustee filing the suit to collect the royalty, The Buckeye Co. promptly filed in the Common Pleas Court of Perry County a suit to clear title of the asserted lien of the mortgage with its two cents royalty provision. When that litigation was completed in 1921, the Buckeye Coal Co. and its grantee, The Sunday Creek Co., promptly filed the present petition in this court in December, 1921.

There were then before the court in June, 1923, two petitions both asking that the Hocking Valley Ry. Co. and its mortgage trustee be required to part with or dispose of all interest they retained in the Buckeye Coal Co. lands and particularly to dispose of the 2c royalty

on coal mined from those lands. The court, however, denied and dismissed both petitions and its reasons for doing so are given in its opinion appearing in the record (p. 109).

The petitions set up substantially the same facts and we have heretofore in our statement of the case shown the principal matters alleged in those petitions. The prayers of both petitioners ask that all interest of the railroad company and its mortgage trustee in the coal lands be disposed of, but the prayers differ to some extent as to the manner in which it should be done. As the opinion of the court on these petitions errs in stating the taxpayers and we here reproduce them. The prayer of the Buckeye Co. is as follows (rec. 11):

> "Wherefore your petitioners pray that proper orders may be entered in this cause, enjoining any demand or collection of said two cents per ton mentioned in said Section 9 of Article 2 of said mortgage, decreeing that all the lands of said Buckeye Company be released and eliminated from said mortgage and particularly from said Section 9 thereof, or that all interest or interests of said railway company and said trust company in said property *be sold* or such other and appropriate order herein as will effectively carry out the purpose and effect of the main decree entered herein."

The prayer of the petition filed by the United States (rec. 71-2) asks the court to hold that the lien of the Hocking Valley mortgage and the 2c royalty provision therein give "an interest in and a domination and control over said Buckeye Company and its properties contrary to the decrees entered therein on March 14, 1914, and May 19, 1916," and proceeds:

> "That defendants, The Hocking Valley Railway Company and The Central Union Trust Company of New York, trustees, be required to release the above described coal lands from the lien of said Hocking Valley first consolidated mortgage, and to release

> The Buckeye Coal & Railway Company from its obligations under Section 9 of said mortgage, upon payment by said Buckeye Company, or its successors in interest, to The Central Union Trust Company of the reasonable value of the rights of said trustee thus to be relinquished."

The prayer is also that the value of the interests of the Hocking Valley and its mortgage trustee in the coal lands be ascertained, etc., and

> "6. That petitioner have such other and further relief as may to the court seem just."

It will be observed that the petition of the Buckeye Coal Company asks, in the alternative, among other things, that the interests of the railway company and its mortgage trustee may be sold or for such other order as will effectually carry out the main decree in the case. The opinion of January 18, 1924, (rec. 109) denying these two petitions states at the head of record page 113 that the difference between the two petitions "is that the one asks release of the property without, the other upon, compensation to the mortgage trustee." The mistake of the court in so stating the prayers of the petitions is apparent.

In passing, attention is called to the statement in the opinion (rec. 111) that when the Buckeye stock was sold in 1916, testimony of witnesses was taken in open court showing the reasonableness of the price paid. What that testimony showed and why the price was fixed at the sum indicated does not appear in this record.

The doubt expressed by the court in that opinion (rec. 113) as to a continuing jurisdiction of the court to force complete dissolution of the condemned combination appears unfounded and is not relied upon, probably in view of the earlier sentence in the same opinion (rec. 110) where the court says the jurisdiction of the cause was retained to force complete dissolution of the combi-

nation condemned. An earlier opinion in the same record (rec. 205) in a footnote also passed upon the claim that jurisdiction had been exhausted and held that complete jurisdiction remained.

The allegation of the opinion (rec. 113) that the sale of the Buckeye stock was approved with full knowledge of the situation is immaterial. There certainly was such knowledge, for the court in its order of October, 1916, approved the contract whereby the Hocking Valley Ry. disposed of its holdings in Buckeye Company stock to Jones, which expressly reserved the question of whether the covenants and obligations of the railway company's mortgage were binding upon the Buckeye Coal Co. when it is provided in the Fifth clause of that contract (rec. 60-1) that nothing therein "contained is intended or shall be construed in anywise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained" in said mortgage. The court, therefore, probably knew and the parties certainly knew that that question was reserved.

The lower court was inconsistent in dismissing the present petitions. It provided in the main decree that no interest whatsoever in the coal lands should remain in the Hocking Valley Ry. Co. It refused to allow the sale of the Buckeye Coal Co. stock to Mr. Poston because part of the consideration to be paid by him was an income bond (not very different from a dividend or a royalty) secured upon the Buckeye property and to be given to the Hocking Valley Ry. Co. or its mortgage trustee, on the ground that by such income bond there would be retained an interest in the property for the benefit of the Hocking Valley Ry. Co. It forced the sale of the Buckeye Coal Co. capital stock to Jones after carefully examining Jones as to whether he had any railroad affilia-

tions. And yet the same court, in the order now complained of, dismissed two petitions, one by the party aggrieved and one by the United States (original complainant), which asked it to require the separation of the railroad company and its mortgage trustee from the very important interest in the lands of the Buckeye Coal Co., which that railroad and its mortgage trustee retain to this present day.

The Hocking Valley Ry. Co. and its mortgage trustee held two interests in the coal lands involved, one was by ownership of the capital stock of the Buckeye Co. which owned the lands, and the other because that coal company mortgaged its lands to the same mortgage trustee for the benefit of the same railroad company and agreed in the mortgage to pay a royalty on those lands. Probably the latter interest, the one now under discussion, was as important, was as great or greater a violation of the law and existed to the same extent in violation of the main decree in this case as did the ownership and mortgage of the capital stock of the company that owned that land.

Why does the Hocking Valley Ry. Co., oppose these petitions? Is its opposition not proof of the fact that the decree of March 14, 1914, has not been obeyed? Is it not because it seeks to retain a valuable interest in coal properties? Is not its attitude proof of the vice pointed out in the opinion at page 167 in the *Continental Co.*, case, *supra,* where it was said,—

> "It is further questioned whether the interest which the new Coal Company, with its properties still subject to the lien of the general mortgage, will have in preserving the solvency of the Reading Company, would not create a constant motive on its part to favor the Reading Company with its tonnage and discriminate against other carriers reaching its mines. It is pointed out, too, that the interest of the

Reading Company in the continuing ability of the Coal Company to avoid default on its proposed mortgage for $25,000,000 to secure bonds to be given to the Reading Company, would prompt a community of operation between the two companies which it was the object of this court to end."

Controlling Effect of the Decrees of the Federal Court Over the Decree of the State Court.

It is immaterial whether or not the Buckeye Coal Company did right in submitting to the state court, on its bill to quiet title, the question of freeing its land from the railroad incubus. It probably did not imagine that the state court would disregard the decree entered herein on March 14, 1914. The questions involved, the rights of the parties, had been settled by the Federal Court in that decree, which stood in full force and effect. It was founded upon a proceeding instituted by the United States in the interest of the public and to enforce the federal laws. That decree reserved jurisdiction in order to completely dissolve the illegal combination. Jurisdiction over all these matters ever since the filing of that suit by the United States has been the primary jurisdiction, and the orders and decrees made therein supersede any decision of any state court in a subsequent proceeding that arrives at any contrary conclusion, especially where the United States or the state of Ohio was not represented in those subsequent state court proceedings.

When the court pronounced this opinion on January 18, 1924, (rec. 109), it was acting in a suit that took precedence in time, parties and subject matter over the later proceeding in the state court and the federal court was so acting upon the petition not only of the Buckeye Coal & Ry. Co. but of the United States, original com-

plainant herein, a party who was not and could not have been made a party to the state court proceeding. Therefore, the jurisdiction of the federal court in passing upon the two petitions now involved, and in carrying out the decree of March 14, 1914, was above and beyond the action of the state court, even if the state court had had before it the same questions as are now before this court.

But the state court did not have the same questions before it. It was simply a suit between two citizens of Ohio to quiet title to land. No question of public policy was involved, no representative either of the United States or of the State of Ohio was present in that state court proceeding; no Sherman Anti-Trust law was before the state court or mentioned in its proceedings, and therefore, in the proceeding before the Federal Court when on January 18, 1924, it pronounced the opinion we are now considering, little or no weight should have been given to the state court proceedings.

If the state court was attempting to pass upon the same matters as are contained in the decree of March 14, 1914, if it was considering the same doctrines between the same parties, then it must have arrived at a conclusion different from the Federal Court decree and have declined to follow that decree and entered a judgment diametrically opposed to the decree of March 14, 1914, and the subsequent orders.

The Buckeye Company went into the state court relying upon the decree of March 14, 1914, and urged the state court to clear the title to its lands in conformity with that decree. If the state court refused in such a proceeding to recognize the validity of the decree of March 14, 1914, and arrived at some other conclusion, that conclusion is not binding upon the Federal Court.

Especially is this true as the two petitions before the court in June, 1923, are founded upon that decree of March 14, 1914, and only asked its enforcement and one of those petitions was presented by the United States. Certainly so far as the United States is concerned, so far as public policy is involved, so far as the enforcement of the Sherman Anti-Trust Act is in question, the state court could not adjudicate contrary to the decree of March 14, 1914.

That part of the opinion appearing in the lower half of record page 114, which speaks of the illegal interferences being reduced to a minimum is also a mistaken position of the court. An affidavit of Dukes (rec. 248) was introduced upon the final hearing of the two petitions in June, 1923. That affidavit shows that the Buckeye Coal Co. property amounts to over 11,000 acres of coal lands; that there then remained in it upwards of 18,000,000 tons of lump coal; that about one-eighth of such lands were acquired by said Buckeye Company after the mortgage was made in 1899; that the amount of coal mined from those lands since the Hocking Valley Ry. Co. was compelled to sell the stock of the Buckeye Coal Co. is 3,741,187 tons, and that no royalty has been paid thereon. These figures mean large amounts of royalty and a consequent great control by the Hocking Valley Ry. Co. of coal throughout that coal field.

In the opinion and decree of the lower court May 19, 1916, (rec. 208, foot note) the court in answering the suggestion that only the railroad's equity in the lands above the mortgage be sold said:

> "We would have no confidence that a sale of the mere equity of the Hocking in these stocks and bonds would bring more than temporary independence. The purchaser could not free them from the overwhelming mortgage nor compel its foreclosure, but

> the danger of foreclosure and the consequent wiping out of this equity would be constant."

Why then did the court, if it had no confidence in such a sale, leave with the railroad company and its mortgage trustee a heavy mortgage and a valuable royalty right in the lands. Or is it that the court then believed the sale of the stock of the Buckeye Coal Co. would carry with it or eliminate the mortgage lien and the royalty provision?

The Mortgage Lien and the Royalty Provision Constitute Heavy Burdens on the Buckeye Coal Company.

In relation to what the court says about a minimum of danger of the Buckeye Company's property being lost by foreclosure of the mortgage, it must be remembered that there is here a mortgage constituting a cloud on all the lands of the Buckeye Coal Co., rendering them unavailable for sale, and that the mortgage does not mature by its terms until 1999. Moreover, although the court says there is but a minimum of responsibility under the provisions we are discussing, a mortgage of $20,000,000 now rests upon the lands of the Buckeye Coal Company, that mortgage although probably never to be enforced has the effect of wiping out the invested capital of the Buckeye Company under the income tax law, and leaving it without any property to be treated as invested capital in ascertaining the amount of taxable income. Therefore, the court is mistaken in intimating that this is an unimportant question.

Again in the opinion at the top of page 114, the court states that it would be inequitable to allow the Buckeye Company owners to "escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force." This part of the opinion is not

well founded in any view. It may be that it is intended to relate to the contract of October 1916 under which Jones acquired the capital stock of the Buckeye Coal Co. We insist that Jones never recognized any liability of the Buckeye Coal Co. under the Hocking Valley Ry. mortgage. In the contract last referred to there is a recitation of certain things done, and among those recitations is one showing the making of the mortgage, but the recitation of making the mortgage does not affirm its validity. The mortgage was made, signed and recorded, but it is not necessarily valid. The Morgan scheme of reorganization in 1899 was promulgated and performed and under it the combination of railroad and coal properties was brought into being. A recitation of those facts or a recitation that the scheme of reorganization was made and signed would not be an admission that that combination was legal. Indeed the court in its decree of March 14, 1914, recites that certain things were done, and then declares those acts invalid and void. So Jones in signing a contract in which there were recitations of certain things done did not assume any liability therefor or acknowledge their validity.

In the opinion the court also intimates that it would be inequitable for Jones to avoid the effect of this mortgage. Where does any want of equity arise? It is the law of this case that the combination of 1899 was illegal and against public policy. The Buckeye Coal Co. was organized as part of that scheme and all its stock was issued for the coal lands and then turned over by the purchasing committee to the Hocking Valley Ry. Co., without any consideration so far as the record shows. Being in complete control of the Buckeye Company through holding that stock the act of signing the mortgage with the name of the Buckeye Coal Company was practically the act of the Hocking Valley Ry. Co., done in carrying out the illegal scheme of reorganization.

The purchasing committee at the foreclosure sale in 1899 bought railroad properties and coal properties. It transferred the railroad properties to the Hocking Valley Ry. Co., which latter company, so far as the record shows, paid nothing for such properties except issuing its capital stock and making a railroad mortgage. The same purchasing committee transferred the coal properties to the Buckeye Company, which latter company paid nothing for such properties other than issuing its capital stock and agreeing to be surety on the railroad mortgage. How then can it be said, on the contention of the Hocking Valley Ry. Co. and its mortgage trustee, that it is inequitable that the Buckeye Company should be free from the mortgage and from the royalty provision? The Hocking Valley Co. paid nothing for its property except the making of the mortgage. It was the purchasing committee that made deeds to both of these companies and the Hocking Valley concedes and has agreed that the Buckeye Co. is only surety and its mortgaged property should not be taken for the mortgage. Where then is there any want of equity in the position taken by the Buckeye Coal Co. or any hardship on the Hocking Valley Ry. Co.?

When, in 1916, the Buckeye Co. stock was sold in order to make a more complete separation between the railroad and coal properties, the purchaser, Jones, was justified in believing that by that sale the Hocking Valley Ry. Co. and its mortgage trustee parted with every particle of interest they had in the Buckeye Coal Co. lands. Did the court intend to separate the railway company from only part of its ownership and interest in the coal lands? Since that sale of the stock of the Buckeye Company in 1916, no royalty has been paid and the Buckeye Company has not acknowledged that the railway

ompany or its mortgage trustee has any interest in the oal company lands (rec. 248-9).

What then are the equities in this case? Is it equitable iat, in defiance of the main decree in this case, the rail-ay company or its mortgage trustee shall retain a very ubstantial interest in these coal lands—a royalty of e a ton on over 18,000,000 tons of coal and a lien upon ie lands themselves in favor of payment of the principal f the bond issue? Is it not much more equitable that ie separation should be declared complete and that the uckeye Company should hold its lands free from any iterest therein of the railroad company or its mortgage rustee?

In presenting its case, counsel for the railroad com-any and its mortgage trustee insist on treating them as they had done no wrong, as if their interests must be s tenderly cared for in a court of equity as if they were ie most innocent persons in the world, no punishment to be meted out to them, nothing harsh is to be done iem, they must have everything that they could or would ave had if the court had held that the illegal combina-on was legal and equitable. Jones had done nothing in-quitable, but even if he had, yet in behalf of the public ie separation must be carried out whoever may suffer.

In *East St. Louis* v. *Jarvis*, 92 Fed. 735, the Circuit ourt of Appeals in speaking of an illegal and unauthor-ed control of competing lines of railroad said:

> "The objection to the contract is not merely the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In *McMullen* v. *Hoffman*, 174 U. S. 639, in speaking of a contract against public policy, the court said:

> "Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description or the force of the public policy which condemns them." (p. 649).
>
> "The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. * * * The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law." (p. 669).

Plainly in this case the offense against public policy consists in entering into the railroad and coal combination in 1899. A mortgage forming part of the combination ought not to be enforced. Jones, the present owner of the Buckeye Company, was not in that combination. He was not in *pari delicto* with the reorganization committee or any of its creatures. In 13 C. J. 489 it is said:

> "The same is held where the complaining party has entered into the illegal contract through the duress of undue influence of the other. If one party is but an instrument in the hands of the other, then they are not in *pari delicto*. If the mind of one of the participants in the transaction exercises an undue influence over that of the other, whether by imposition or threat on the one side and confidence or weakness on the other, equity will grant relief to the latter."

The result of the opinion of the lower court now complained of (rec. 109) is that the illegal combination of 1899 suffers no harm or punishment. The Hocking Val-

ley Ry. Co. is permitted to retain a very valuable interest in coal lands, to collect a 2c royalty on over 18,000,000 tons of coal. The combination of railroad and coal properties so vigorously denounced by the lower court in 1914, now receives the sanction of the same court. The manner of effecting a separation of railroad and coal interests pointed out in *Continental Co.* v. *United States*, 259 U. S. 156, is ignored in large matters. The purchasers of the Buckeye Co. capital stock under orders of the lower court are ill-treated. Under the opinion as it now stands the principles and practice approved in the *Continental Co.* case are departed from. That opinion by this court is departed from and avoided. A violation of the decree of March 14, 1914, is condoned and encouraged. The petitions both of the Buckeye Coal Co. and of the United States are denied, and the interests of the public are left to care for themselves in the best manner they can.

In the record (rec. p. 247) appears a stipulation submitted at the hearing, signed by the railway company and its mortgage trustee and by the United States. The Buckeye Co. and the Sunday Creek Co. refused to sign the stipulation and, therefore, that stipulation, although appearing in the record, can have no bearing on this appeal. We call attention, however, to the fact that the United States, petitioner, refused (p. 248) to accede to the claim of the Hocking Valley Co. that the coal company stock was sold for $50,000 on account of the $20,000,000 mortgage. The court in 1916 found that $50,000 was a fair value for the Buckeye Coal Co. capital stock, but how much influence the Hocking Valley Company mortgage had upon that value is not shown. Nor is it shown what other elements entered into the value of the stock as so found. Such value may have been effected by long term leases and low royalties without minimums and

various other matters which do not appear. It is sufficient to say that the Buckeye Co. refused to agree to the stipulation at all and the United States refused to admit how the value of the Buckeye stock may have been ascertained.

In the foreclosure litigation that led up to the reorganization of 1899 several questions were presented for consideration to Mr. Justice Lurton then circuit judge. His opinion thereon appears in 87 Fed. 815, and also at page 222 in the present record. The questions discussed by him do not involve public policy, or the illegality of a combine, or the stifling of competition; they relate entirely to the doctrine of *ultra vires* as between two corporations. In the opinion (rec. p. 225) it is said "The question of *ultra vires* is that upon which the decision must turn."

Considered as limited to the question stated by Judge Lurton, the opinion has no bearing on the questions involved in this case. But if it is to be taken as justifying in any way a combination between railroad and coal companies or as validating a mortgage made by them when considered under the Sherman Anti-trust Act, then we submit that it is in direct conflict with the leading opinion and decree in this case and with the principles laid down in *Continental Co.* v. *United States,* 259 U. S. 156.

We, therefore, respectfully urge that this case be sent back to the lower court with instructions to bring about a complete separation of the railway and coal interests here involved and with instructions as to how that separation can best be effected under the prayers of one or both of the petitions now before the court.

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March, 1925.